Supreme Court, U.S.
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No. ——

IN THE

Supreme Court of the United States

SANDRA HENSLEY, *et al.*,
Petitioners,

v.

NORTHWEST PERMANENTE P.C. RETIREMENT PLAN AND TRUST, a defined contribution pension plan; *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit correctly held that the legal conclusion of a plan administrator with regard to the meaning of the term "employee" as used in an ERISA plan is entitled to deference by a reviewing court?

2. Whether the Ninth Circuit correctly held that pension plan administrators have the discretion to interpret an undefined term in a pension plan (in this case, the term "employee") in a manner that is inconsistent with its clear, well-established federal common law definition?

RULE 14.1(b) STATEMENT

The following are the parties to the proceeding in the Court of Appeals for the Ninth Circuit:

Sandra Hensley, plaintiff-appellee.

John Wiest, Jr., plaintiff-appellee.

Linda Onheiber, plaintiff-appellee.

Donna Hohnstein, plaintiff-appellee.

Northwest Permanente P.C., an Oregon corporation, defendant-appellant.

Northwest Permanente P.C. Retirement Plan and Trust, a defined contribution pension plan, defendant-appellant.

Retirement Plans Committee of the Northwest Permanente P.C. Retirement Plan and Trust, an unincorporated association, defendant-appellant.

Permanente Physicians Retirement Plan for Northwest Permanente P.C., a defined benefit plan, defendant-appellant.

The Administrative Committee of Permanente Physicians Retirement Plan for Northwest Permanente P.C., an unincorporated association, defendant-appellant.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 14.1(B) STATEMENT	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	6
I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE LACK OF DEFERENCE SHOWED BY OTHER CIRCUITS TO LEGAL CONCLUSIONS OF PLAN ADMINISTRATORS	7
II. THE COURT'S DECISION THAT THE ADMINISTRATORS HEREIN HAD DISCRETION TO INTERPRET THE UNDEFINED TERM "EMPLOYEE" IN A MANNER INCONSISTENT WITH ITS WELL-ESTABLISHED FEDERAL COMMON LAW DEFINITION WAS ERRONEOUS	12
CONCLUSION	20

TABLE OF AUTHORITIES

CASES Page

Administrative Committee of the Sea Ray Employees' Stock Ownership & Profit Sharing Plan v. Robinson, 164 F.3d 981(6th Cir. 1999), *cert. denied*, 528 U.S. 1114 (2000) 17

Allen v. Western Conference of Teamsters Pension Trust Fund, 788 F.2d 648 (9th Cir. 1986).. 17

Berger Transfer & Storage v. Central States Pension Fund, 85 F.3d 1374 (8th Cir.1996) 9

Blau v. Del Monte Corp., 748 F.2d 1348 (9th Cir. 1985), *cert. denied*, 474 U.S. 865 (1985)..... 9

Bostic v. Ohio River Co. (Ohio Div.) Basic Pension Plan, 517 F.Supp. 627 (S.D. W. Va. 1981) 12

Brown v. Retirement Committee of Briggs & Stratton Retirement Plan, 797 F.2d 521 (7th Cir. 1996), *cert. denied*, 479 U.S. 1094 (1987).. 10

Central States, Southeast & Southwest Areas Pension Fund v. Independent Fruit and Produce Co., 919 F.2d 1343 (8th Cir 1990), *cert. denied*, 502 U.S. 811 (1991) 13

Clark v. E.I. Dupont De Nemours, Inc., 105 F.3d 646 (4th Cir 1997), *cert. denied*, 520 U.S. 1259 (1997) 14

Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989)..... 14

Coonley v. Fortis Benefit Ins. Co., 956 F. Supp. 841 (N.D. Ia. 1997), *aff'd* 128 F.3d 675 (8th Cir 1997) 15

Dade v. North American Phillips Corp., 68 F.3d 1558 (3rd Cir. 1995) 12

Dial v. NFL Player Supplemental Disability Plan, 174 F.3d 606 (5th Cir. 1999)..... 8

Epright v. Environmental Resources Management, Inc., 81 F.3d 335 (3rd Cir. 1996) 19

TABLE OF AUTHORITIES—Continued

Page

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 ..... 7, 9, 11

Gaines v.Amalgamated Insurance Fund., 753 F.2d 288 (3rd Cir 1985) 13

Ganze v. Dart Industries, Inc., 741 F.2d 790 (5th Cir. 1984) 19

Health Cost Controls v. Isbell, 139 F.3d 1070 (6th Cir. 1997) 12

Holt v. Winpisinger, 811 F.2d 1532 (D.C. Cir. 1987) 8

Maness v. Williams, 513 F.2d 1264 (8th Cir. 1974) 19

Mayeske v. International Association of Fire Fighters, 905 F.2d 1548, *cert. denied*, 498 U.S. 940 (1990) 15, 19

Mayhew v. New England Teamsters and Trucking Industry Pension Fund, 115 N.H. 581, 347 A.2d 610 (N.H. 1975) 15, 16

Nationwide Mutual Ins. Co. v Darden, 503 U.S. 318 (1992) 13, 14, 15, 17, 18, 19

Neder v. United States, 527 U.S. 1 (1999) 13

O'Neil v. Retirement Plan for Salaried Employees of RKO Gen., 37 F.3d 55 (2nd Cir. 1997) 9

Penn v. Howe-Baker Engineers, Inc., 898 F.2d 1096 5th Cir. 1990) 8, 15

Pratt v. Petroleum Production Management Inc., Employee Sav. Plan & Trust, 920 F.2d 651 (10th Cir. 1990) 10

Professional and Executive Leasing, Inc. v. Commissioner, 862 F.2d 751, 753 (9th Cir. 1988) 10

Reiherzer v. Shannon, 581 F.2d 1266, 1272-73 (7th Cir. 1978) 16

Sandoval v. Aetna Life & Casualty Ins. Co., 967 F.2d 377 (10th Cir. 1992) 10

TABLE OF AUTHORITIES—Continued

	Page
Scheuer v. Central States Pension Fund, 358 F. Supp. 1332 (E.D. Wis. 1973)	16
Shaw v. Delta Air Lines, 463 U.S. 85 (1983)	14
Short v. Central States, Southeast & Southwest Areas Pension Fund, 729 F.2d 567 (8th Cir. 1984)	9
Trombetta v. Cragin Fed. Bank for Sav. Employee Stock Ownership Plan, 102 F.3d 1435 (7th Cir. 1996)	17
Vizcaino v. Microsoft, 120 F.3d 1006 (9th Cir. 1997), *cert. denied*, 522 U.S. 1098 (1998)	10
Wardle v. Central States, Southeast & Southwest Areas Pension Fund, 627 F.2d 820 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981)	9, 16
Weil v. Retirement Plan Admin. Comm. of Terson Co., 913 F.2d 1045 (2nd Cir. 1990), *affirmed in part and reversed in part on other grounds*, 933 F.2d 106 (2nd Cir. 1991)	8
Wolf v. Coca-Cola, 200 F.3d 1337 (11th Cir 2000)	14, 19

STATUTES

I.R.C § 414(n)	3
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1291	6
28 U.S.C. § 1331	4
29 U.S.C. §§ 1001, 1021, 1022	12
29 U.S.C. §§ 1001-1461	4
29 U.S.C. §1002(6)	14
29 U.S.C. §1002(7)	14
29 U.S.C. § 1132	2
29 U.S.C. §1132 (a)	14
29 U.S.C. § 1132(a)(1)(B)	7
29 U.S.C. § 1132(e)(1)	4

29 U.S.C. § 1132(a)(1)(B) 7
29 U.S.C. § 1132(e)(1)..... 4

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PETITION FOR A WRIT OF CERTIORARI

Sandra Hensley, John Wiest, Jr., Linda Onheiber and Donna Hohnstein, on behalf of themselves and all others similarly situated, respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-33a) is reported at 258 F3d 986 (9th Cir. 2001). The district court's opinion granting summary judgment to plaintiffs-appellees (App., *infra*, 33a to 44a) has not been officially reported.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 2001. (App., *infra*, 4a.). The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves §1132 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132 (App., *infra* 45a to 54a).

STATEMENT OF THE CASE

Respondent Northwest Permanente P.C. ("NWP") is a private corporation that provides services to members of the Kaiser Permanente Medicare Care Program ("the Kaiser Program"). The Kaiser Program provides prepaid health care services to employees and individuals enrolled in the Kaiser Health Plan, a non-profit qualified health maintenance organization. The Kaiser Program maintains an affiliate, Kaiser Foundation Hospitals, to provide hospital facilities. The Kaiser Health Plan provides administrative and financial services within the Kaiser Program and contracts with independent groups of physicians to provide medical services. (App., *infra*, 5a).

Petitioners herein, a group of nurse practitioners and physicians assistants receive their compensation and retirement and health benefits from the Kaiser Health Plan. However, they work with NWP physicians and other health care professionals. (App., *infra*, 5a to 6a). NWP physicians are involved in their supervision and work scheduling and participate in the setting of recruitment, training and continuing education policies. NWP is involved in hiring and firing decisions, performance reviews, pay adjustments and in the formulation of petitioners' job descriptions. NWP makes decisions concerning petitioners' vacation time, sick leave and leaves of absence. NWP also provides petitioners' malpractice insurance. (App., *infra,* 60a to 61a).

NWP sponsors two pension benefit plans for its employees: the Northwest Permanente P.C. Retirement Plan Trust ("the NWP Plan") and the Permanente Physicians Retirement Plan for Northwest Permanente P.C. ("the Physicians Plan"). The NWP Plan is a defined contribution plan administered by a ten-person committee appointed by NWP's president. The Physician's Plan is a defined benefit plan administered by a ten-member committee comprised of physicians and employees of the Kaiser Health Plan and various medical groups. (App., *infra*, 6a). Both plans are governed by plan documents that set forth the criteria for eligibility to participate. (App., *infra*, 55a to 59a).

Both the NWP Plan and the Physicians Plan require that their administrators construe them in accordance with ERISA. (App., *infra*, 57a to 59a). According to the terms of both the NWP Plan and the Physicians Plan, a person is eligible to participate only if he or she is a "Qualified Employee". A "Qualified Employee" is defined by the NWP Plan, in relevant part, as "any employee of Employer". "Employer" is defined as NWP. The only exceptions to the term "Qualified Employee" are for (1) employees covered by a collective bargaining agreement that does not provide for participation in the plan; (2) for leased employees who are treated as employees for pension purposes solely because of I.R.C § 414 (n); and (3) for irregular service or on call physicians and any physician covered by an employment agreement that did not provide for participation in the plan. (App., *infra*, 58a to 59a). Similarly, the Physicians Plan defined the term "Qualified Employee" as any "employee of the Medical Group" with exceptions that are nearly identical to the NWP Plan. (App., *infra*, 56a). Neither plan specifically defines the term "Qualified Employee".

In June of 1995, petitioners submitted formal claims and demands for pension benefits to the administrators of the pension plans. On or about July 28, 1995, the NWP Plan

Administrator denied petitioners' claims for benefits under that plan. Similarly, on September 20, 1995, the Physicians Plan Administrator denied petitioners' claims for benefits brought under that plan. (App., *infra*, 6a). Petitioners sought review of the respective decisions of the Plan Administrators. (App., *infra*, 7a). The NWP Plan Committee affirmed the decision of the NWP Plan Administrator and the Physicians Plan Committee affirmed the decision of the Physicians Plan Administrator. In denying the petitioners claims, the respective Plan Administrators and/or Plan Committees[1] relied primarily on the conclusion that the petitioners were not employees of NWP, the plans' sponsor. The Administrators and/or Committees applied a "W-2" definition to the term employee, finding that because NWP does not and never has treated the petitioners as W-2 employees for Internal Revenue Service purposes, they were not eligible for pension benefits under the respective plans. (App., *infra*, 7a to 8a).

On behalf of themselves and approximately one hundred and fifty similarly situated individuals, Petitioners brought suit in the United States District Court for the District of Oregon seeking injunctive relief and a declaratory judgment that they were intitled to pension benefits pursuant to ERISA, 29 U.S.C. §§ 1001-1461. (App., *infra*, 8a). The district court had jurisdiction over this matter pursuant to 29 U.S.C. § 1132 (e) (1) and 28 U.S.C. § 1331. On May 2, 1997, the district court granted Petitioners' motion for class certification. Respondents moved for a determination that the arbitrary and capricious standard of review governed the district court's review of the administrators' decisions. After the close of discovery, the district court allowed Respondents' motion and adopted the arbitrary and capricious standard. (App., *infra*, 8a).

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[1] Reference in this petition to Plan Administrators is meant to encompass the Plan Committees as well.

The parties filed cross motions for summary judgment. On or about August 13, 1999, the district court granted Petitioners' motion and denied that of Respondents. (App., *infra*, 8a). The district court found that, if the Plan Committees committed legal error by employing an improper legal standard, then they abused their discretion (App., *infra*, 42a). The district court stated that a "reasonable interpretation by a plan administrator of an undefined term in the plan document must take into account whether the plan term has an accepted statutory or common law meaning." (App., *infra*, 41a). The court found that the term "employee" had such an established common law meaning and was hence not ambiguous. (App., *infra*, 42a). Since the pension plans at issue did not define the term in a manner that was contrary to the established common law definition, the court held that the Plan Committees had abused their discretion by ignoring "common legal principals" and applying the incorrect legal standard. (App., *infra*, 42a). The court stated that allowing the Plan Administrator to "supply any definition it sees fit" would make "a mockery of even the lenient arbitrary and capricious standard of review." (App., *infra*, 41a). It further held that defining "employee" merely as one who receives a W-2 form by the employer based upon its past practice was "an unwarranted abdication to the employer of the plan administrator's responsibility." (App., *infra*, 42a). The district court remanded the case to the Plan Committees for new determinations of the petitioners' eligibility for benefits under the common law definition of "employee". (App., *infra*, 43a to 44a). Respondents appealed this decision to the Ninth Circuit Court of Appeals.

On August 26, 1999, Petitioners filed a petition for attorney's fees and costs, which the district court granted on December 7, 1999, awarding Petitioners $159,547.02. Respondent's separately appealed from the order concerning attorney fees and costs. (App., *infra*, 9a). Both appeals were

consolidated by the Ninth Circuit, which had jurisdiction to review the decisions of the district court under 28 U.S.C. § 1291.

The Ninth Circuit reversed the decisions of the district court. The Ninth Circuit held, without distinguishing between factual and legal issues, that the arbitrary and capricious standard of review required the district court to give substantial deference to the administrators' decision to apply a "W-2" definition to the term employee, rather than its well established federal common law definition. (App., *infra*, 27a). The Ninth Circuit ruled, as a matter of law, that a plan administrator had discretion to interpret a term used, but not otherwise defined in a pension plan, in a manner which was inconsistent with its established federal common law meaning. (App., *infra*, 26a).[2]

REASONS FOR GRANTING THE WRIT

This case presents the court with an opportunity to clarify the standard of review applied by courts reviewing the legal decisions of ERISA plan administrators. The Ninth Circuit held that the court must defer to the administrators' choice of a legal standard to be applied in determining whether petitioners have employee status. This decision is in stark contrast to the decisions of other circuits, which have held either that (1) an administrators' legal decisions are not entitled to deference and may be judged by the court *de novo* or (2) that an administrator acts in an arbitrary and capricious manner when it commits an error of law.

The Ninth Circuit's decision also conflicts with the decisions of other circuits, which have held that, when an employee benefit plan does not contain a definition of

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[2] The Ninth Circuit reversed the district court's decision concerning attorney fees because its reversal of the district court's grant of Petitioners' motion for summary judgment meant that Petitioners were no longer prevailing parties. (App., *infra*, 29a).

employee, the common law definition is to be applied. In addition, the decision of the Ninth Circuit conflicts with a decision of a state court of last resort, the Supreme Court of New Hampshire, which held that pension plan administrators act in an arbitrary and capricious manner when they ignore common law factors defining the "employer–employee relationship" and make eligibility decisions solely on the basis of whether the alleged employer paid social security taxes for the employee in question.

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE LACK OF DEFERENCE SHOWED BY OTHER CIRCUITS TO LEGAL CONCLUSIONS OF PLAN ADMINISTRATORS.

Although ERISA is a comprehensive statute, it nonetheless does not set out the appropriate standard of review for actions under § 1132(a) (1) (B) challenging benefit eligibility determinations. 29 U.S.C. § 1132(a) (1) (B). Thus, in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, this Court, incorporating the law of trusts, held that an ERISA plan administrators' eligibility determinations would normally be judged under a *de novo* standard of review, unless the plan gave the administrator discretionary authority to determine eligibility or to construe the terms of the plan. If, as in the case at bar, the plan documents confer such discretionary authority upon the administrator, eligibility decisions would be judged under an arbitrary and capricious standard.

Although *Firestone* has been "on the books" for twelve years now, this Court has not had occasion to delineate the precise scope of judicial review of the legal decisions of ERISA administrators. Numerous courts have held that, notwithstanding a grant of discretionary authority to a plan administrator by a plan document, *questions of law* under-

lying an administrator's eligibility determination are to be reviewed *de novo* by the court.

Thus, in *Penn v. Howe-Baker Engineers, Inc.*, 898 F.2d 1096 (5th Cir. 1990), the Fifth Circuit held that, under *Firestone*, legal questions were to be decided *de novo* by the court even though the plan gave the administrator discretion to interpret plan terms. The court stated that it owed no deference to the administrator's conclusions ". . . as to the controlling law. . ." *Id.* at 1100. The court held that the appropriate process of review was for the court to determine the *legally* correct interpretation of the plan and then to determine whether the plan administrators acted arbitrarily or capriciously in light of that interpretation. *Id.* at 1100. The court held that the question of whether an individual was an employee or an independent contractor in the ERISA context, was a legal question and it applied well-established federal common law standards in concluding that the plaintiff therein was, in fact, an independent contractor. *Id.* at 1101-02. In *Dial v. NFL Player Supplemental Disability Plan*, 174 F.3d 606 (5th Cir. 1999), the Fifth Circuit cited *Penn* and repeated its holding that a plan administrators' statutory *and legal conclusions* were reviewed *de novo* even if the plan document afforded the administrator discretion to interpret plan provisions. *Id.* at 611.

Similarly, in *Holt v. Winpisinger*, 811 F.2d 1532 (D.C. Cir. 1987), the D.C. Circuit ruled that, although the arbitrary and capricious standard applied to a plan administrators' decision to deny benefits, the question of whether an individual was an employee was a question of law which should be decided by the court. The court held that, while it might defer to the plan administrators' findings concerning factual issues that were relevant to the legal question of employee status, it owed no similar deference to the administrators' ultimate legal conclusion in this regard. *Id.* at 1536, n. 31. *See also Weil v. Retirement Plan Admin. Comm. of Terson Co.*, 913 F.2d

1045, 1049 (2nd Cir. 1990), *affirmed in part and reversed in part on other grounds*, 933 F.2d 106 (2nd Cir. 1991) (despite a broad grant of discretionary authority to determine eligibility and to interpret plan documents under *Firestone*, the court owed no deference to the administrators' conclusions as to legal questions, which were reviewed *de novo*); *O'Neil v. Retirement Plan for Salaried Employees of RKO Gen.*, 37 F.3d 55, 62 (2nd Cir. 1997) (legal decisions of administrators owed no deference).

Other circuit court cases which hold that employee status under ERISA is a question of law include *Berger Transfer & Storage v. Central States Pension Fund*, 85 F.3d 1374, 1377-78 (8th Cir.1996) (while the existence and degree of each factor under the common law test is a question of fact, the ultimate conclusion to be drawn from those facts is a question of law); *Short v. Central States, Southeast & Southwest Areas Pension Fund*, 729 F.2d 567, 571 (8th Cir. 1984) (a trustee acts in an arbitrary and capricious manner when he makes an erroneous legal conclusion concerning an individual's employee status); and *Wardle v. Central States, Southeast & Southwest Areas Pension Fund*, 627 F.2d 820, 824 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981) (employee status under ERISA is question of law to be judged by common law standards).

Other courts have not spoken in terms of *de novo* review of legal issues, but have instead expressed the notion that plan administrators abuse their discretion or act arbitrarily and capriciously when they commit legal errors. Thus, in *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1352-53 (9th Cir. 1985), *cert. denied*, 474 U.S. 865 (1985), the Ninth Circuit described the deferential standard of review generally applicable to administrator decisions under ERISA as follows: ". . . decisions by the trustees will not be reversed unless they are arbitrary, capricious, made in bad faith, not supported by substantial evidence, or *erroneous on a question of law*."

(emphasis added). *See also Pratt v. Petroleum Production Management Inc., Employee Sav. Plan & Trust*, 920 F.2d 651, 657 (10th Cir. 1990); *Brown v. Retirement Committee of Briggs & Stratton Retirement Plan*, 797 F.2d 521, 525-26 (7th Cir. 1996), *cert. denied*, 479 U.S. 1094 (1987).[3]

Similarly, in *Vizcaino v. Microsoft*, 120 F.3d 1006, 1013 (9th Cir. 1997), *cert. denied*, 522 U.S. 1098 (1998), the court held that a denial of benefits under an ERISA plan was arbitrary and capricious because the denial was based upon legal errors which misconstrued the plan and applied a wrong legal standard to a benefits determination. In *Sandoval v. Aetna Life & Casualty Ins. Co.*, 967 F.2d 377, 380 (10th Cir. 1992), the court stated: "In our view, both lack of substantial evidence and a mistake of law would be indicia of arbitrary and capricious actions and thus may be subsumed under the arbitrary and capricious label."

In these cases, the courts do not state that any particular deference is owed to the plan administrators' legal conclusions. They are thus consistent with the cases cited above: that, under the arbitrary and capricious standard, legal questions are nonetheless subject to independent review by the court, which owes no deference to the administrator's legal, as opposed to factual, conclusions.

The Ninth Circuit's decision in the case at bar signals a sharp break with this well-established legal authority. The Ninth Circuit has, in essence, ruled that the district court was required to give deference to the administrators' legal conclusion that it was not required to apply a common law definition of employee. The Ninth Circuit thus ruled that a

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[3] The Ninth Circuit has held that employee status is a mixed question of law and fact that is subject to a 'clearly erroneous" standard of review. *Professional and Executive Leasing, Inc. v. Commissioner*, 862 F.2d 751, 753 (9th Cir. 1988). This split with the many circuits that hold otherwise constitutes another compelling reason for this Court to grant review.

court could overturn an administrator's decision as to the correct legal standard to apply in judging employee status only if it was "so patently arbitrary and unreasonable as to lack foundation in factual basis and/or authority in governing case law or statute." (App., *infra*, 27a).

Under the Ninth Circuit's standard in the case at bar, an employee seeking to contest a plan administrator's legal conclusion would have to establish that the plan administrator's legal interpretation was *completely* lacking in authority in governing case law or statute. Such deference to the legal conclusions of a plan administrator would be qualitatively greater than any deference that an appellate court would show the legal conclusions of a trial court. Clearly, under the law of trusts from which this Court borrowed many of the principals espoused in *Firestone*, the courts were given authority to decide legal issues *de novo* and were not required to defer to the legal conclusions of trustees. Thus, in its review of common law trust principles in *Firestone*, this Court stated as follows: "The extent of the duties and powers of a trustee is determined by the rules of law that are applicable to the situation and not the rules that the trustee or his attorney believes to be applicable. . ." *Firestone Tire & Rubber*, 489 U.S. at 112. Clearly, plan administrators have no special expertise in the law and can not usurp the role of the courts to decide legal issues.

The Ninth Circuit's decision is at odds with the decisions of other circuits as well as its own decisions with regard to the appropriate standard of review of an administrator's legal conclusions. Review by this Court is necessary to establish uniformity within the circuits with regard to the appropriate standard of review under *Firestone*.

II. THE COURT'S DECISION THAT THE ADMINISTRATORS HEREIN HAD DISCRETION TO INTERPRET THE UNDEFINED TERM "EMPLOYEE" IN A MANNER INCONSISTENT WITH ITS WELL-ESTABLISHED FEDERAL COMMON LAW DEFINITION WAS ERRONEOUS.

The Ninth Circuit's decision herein gives plan administrators unfettered discretion to interpret undefined plan terms in any way they deem fit despite the fact that these terms have clear, well-established federal common law meanings. In this regard, the Ninth Circuit vastly expands the power of plan administrators and raises a formidable hurdle to employees who seek to obtain plan benefits.

The court's decision rewards plan administrators for obscurity in plan language and runs counter to fundamental purposes of ERISA. One of the fundamental purposes of ERISA is to provide clear and easily understood information to employees concerning the operation and administration of employee benefit plans. 29 U.S.C. §§ 1001,1021,1022. Another fundamental principle is that ERISA is to be liberally construed in favor of employees in order to foster the provision of pension benefits. *See e.g. Dade v. North American Phillips Corp.*, 68 F.3d 1558, 1562 (3rd Cir. 1995); *Bostic v. Ohio River Co. (Ohio Div.) Basic Pension Plan*, 517 F.Supp. 627, 630 (S.D. W. Va. 1981). Another important purpose is that the integrity and primacy of plan language be upheld by affording such language its plain and ordinary meaning. *Health Cost Controls v. Isbell*, 139 F.3d 1070, 1072 (6th Cir. 1997). The Ninth Circuit's decision undercuts each of these important purposes as it encourages the utilization of vague and undefined language as a means to give plan administrators virtually unfettered discretion to deny pension benefits to employees.

Petitioners do not contest the notion that plan administrators have the discretion to give meaning to an undefined plan term that does not have a well-established federal common law definition. However, where a crucially important term such as "employee" (which in many cases will be dispositive of a benefit eligibility decision) is left undefined and when the meaning of that term has a *clearly established* common law definition, plan administrators are not free to ignore it. Under such circumstances, there is simply no "ambiguity" for the administrators to interpret and they are bound to apply the federal common law definition.

The question of whether an employee benefit plan provision is ambiguous is a question of law that should be decided by the court *de novo*. *Gaines v. Amalgamated Insurance Fund.*, 753 F.2d 288, 290 (3rd Cir 1985). A contract, such as a pension plan, is ambiguous only if it reasonably susceptible to more than one construction. In ascertaining whether a contract is reasonably susceptible to more than one interpretation, words are to be given their plain and ordinary meaning as understood by a reasonable average person. *Central States, Southeast & Southwest Areas Pension Fund v. Independent Fruit and Produce Co.*, 919 F.2d 1343, 1350 (8th Cir 1990), *cert. denied*, 502 U.S. 811 (1991).

Petitioners herein contend that the plain and ordinary meaning of the term "employee" as used in an ERISA plan is, as a matter of law, the federal common law definition of that term as set forth by this Court in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992). In *Darden*, the Court applied the "well-established"principle of construction that "where Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress meant to incorporate the established meaning of those terms. . .". *Id.* at 322. *See also Neder v. United States*, 527 U.S. 1 (1999).

The Court in *Darden* stated that, under 29 U.S.C. § 1132(a), a "participant" in an employee benefit plan could sue to enforce his ERISA rights under said plan. A participant is defined under the statute as "any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan." 29 U.S.C. § 1002(7). The term "employee" is defined as "any individual employed by an employer." 29 U.S.C. § 1002(6). *Darden*, 503 U.S. at 320-321. The Court found this definition of employee was "completely circular and explains nothing." *Id* at 323. The Court thus applied the federal common law test of agency, not the test of any specific state. *Darden,* 503 U.S. at 324, n.3. *See also Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989) (the courts should, under a broadly preemptive federal statute, apply *federal* common law, not that of the states).

It is thus clear that an individual (other than a beneficiary or fiduciary as defined in the Act) has no right to file suit to enforce pension benefit rights under ERISA unless "employee" status under the federal common law "right-to-control test" is satisfied. *Darden,* 503 U.S. at 323. Petitioners recognize however that the terms of a pension plan may limit the classes of "employees" who are entitled to benefits. *See e.g. Shaw v. Delta Air Lines,* 463 U.S. 85, 91 (1983). Thus, it has been held that ERISA imposes two requirements for participant status. First, the plaintiff must prove status as an employee under the *Darden* test. Second, plaintiff must be, according to the language of the plan itself, an employee who is eligible to receive benefits. *Wolf v. Coca-Cola*, 200 F.3d 1337, 1340 (11th Cir 2000); *Clark v. E.I. Dupont De Nemours, Inc.*, 105 F.3d 646 (4th Cir 1997), *cert. denied*, 520 U.S. 1259 (1997).

Where the language of the plan does not itself set forth a definition that is inconsistent with the federal common law

definition as articulated in *Darden*, other circuits have seen fit to apply the common law definition. Thus, in *Penn v. Howe-Baker Engineers, Inc.*, 898 F.2d at 1101, the Fifth Circuit reviewed *de novo* the plan's determination that plaintiff was not an "employee" (under a plan which did not define that term and which conferred discretion upon the administrator to interpret its terms) and applied the common law test.

In *Coonley v. Fortis Benefit Ins. Co.*, 956 F. Supp. 841 (N.D. Ia. 1997), *aff'd* 128 F.3d 675 (8th Cir 1997), the court held that, where an ERISA plan does not define employee, ". . . it is reasonable to assume that the same definition as is applicable to who is an 'employee' under the ERISA statute would apply to who is an 'employee' under an ERISA plan." *Id.* at 856. The court stated that: "Where the parties intended some definition other than the one applied to 'employee' under the statute itself, that is, some definition other than that provided by federal common law, they were free to specify such a definition." *Id.* at 856.

In *Mayeske v. International Association of Fire Fighters*, 905 F.2d 1548, *cert. denied*, 498 U.S. 940 (1990), Justice Thomas, writing on behalf of a panel which included Justice Ginsburg, stated as follows:

> Since the plan does not define "employed by," we see no reason why the common-law definition of "employee," see *Holt*, 811 F.2d at 1538-40, should not control the question whether Mayeske was an "Employee" under the Staff Representatives' pension plan. *This conclusion creates a significant overlap between the employment status inquiry and the participation inquiry.*

Id. at 1557, n. 11 (emphasis added). This is precisely the argument being made by Petitioners herein.

In *Mayhew v. New England Teamsters and Trucking Industry Pension Fund*, 115 N.H. 581, 347 A.2d 610 (N.H. 1975), the New Hampshire Supreme Court similarly decided that pension plan administrators could not ignore the common law

definition of employee under a plan that did not define the term. In *Mayhew*, the plan gave the trustees unfettered discretion to determine eligibility questions. The court thus decided the denial of benefits decision under the arbitrary and capricious standard. The trustees interpreted the undefined term "employee" as used in the plan to mean individuals for whom the alleged employer paid social security taxes. Such a rule is similar, if not identical, to the "W-2" definition applied by the administrators herein. The court in *Mayhew*, citing *Scheuer v. Central States Pension Fund,* 358 F. Supp. 1332 (E.D. Wis. 1973), held that the trustees acted in an arbitrary and capricious manner by determining the employer-employee relationship merely on the payment or non-payment of social security taxes. The court stated:

> The failure of the pension fund agreement to include the common-law definition of employer-employee status does not permit the trustees to close their eyes to the true relationship. The rule of thumb adopted by the trustees delegated the decision to the employer whose self-interest dictated avoidance of the social security tax.

Mayhew, 347 A.2d at 611.[4]

The same statement can be made in the case at bar. The Ninth Circuit's decision means that plan administrators can, under a plan that does not define "employee", delegate to the employer (or plan sponsor) the decision as to who will or will not be eligible under the terms of the plan, regardless of the legal realities of the parties' relationship. As stated by the district court below, plan administrators can not abdicate their responsibility to determine who is or is not an "employee" merely by accepting the employer's designation. (App.,

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[4] Similarly, in *Reiherzer v. Shannon*, 581 F.2d 1266, 1272-73 (7th Cir. 1978), the court held that the trustees of an ERISA plan acted in an arbitrary and capricious manner when they determined that an individual was not employed within the meaning of the plan due to the fact that he paid his own federal taxes. *See also Wardle*, 627 F.2d at 825.

infra, 42a). If the trustees are not required to look beyond the employer's designation of the employee's status, the realities of the situation are thus never explored. Clearly, the wearing of such a blindfold is arbitrary and capricious.

The Ninth Circuit's decision that the Plan Administrators herein could deny benefits merely because the employer didn't require the employees to fill out a "W-2" form was based on three prior cases, none of which directly support this proposition. Thus, in *Administrative Committee of the Sea Ray Employees' Stock Ownership & Profit Sharing Plan v. Robinson*, 164 F.3d 981(6th Cir. 1999), *cert. denied*, 528 U.S. 1114, (2000), the court held that the plan administrators had discretion to construe the term "partially terminated" as used in the plan. This case is clearly distinguishable, as this term does not have a well-established federal common law definition that has been endorsed by this Court, as does the term "employee". Similarly, in *Allen v. Western Conference of Teamsters Pension Trust Fund*, 788 F.2d 648 (9th Cir. 1986), the court merely held that, where a pension plan specifically defined the term "surviving spouse" as one who was married to the participant, California law regarding unmarried "putative" spouses could not be used to vary the term of that specific definition. *Allen* simply did not involve an undefined term of a pension plan that had a well-established *federal* common law meaning.[5]

Trombetta v. Cragin Fed. Bank for Sav. Employee Stock Ownership Plan, 102 F.3d 1435 (7th Cir. 1996), while "closer to the mark", also does not afford plan administrators' the right to ignore the "right to control test" articulated by this Court in *Darden*. In *Trombetta*, the plan committee denied benefits after a careful consideration of all of the factors under *Darden*'s common law test, but placed great weight on

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[5] The Ninth Circuit recognized that neither *Allen* nor *Robinson* was directly on point. (App., *infra*, 24a to 25a).

the plaintiffs' execution of independent contractor agreements.[6] While plaintiffs argued that only the common law factors could be applied, the Seventh Circuit disagreed, holding that the trustees thoroughly considered and decided the case under the common law factors and were certainly allowed to consider the execution of the independent contractor agreements as well. *Id.* at 1440. The court's statement that nothing in ERISA compels a plan to use the term "employee" in the same way it was used in the statute was correct but was not particularly relevant as there was no indication that any other definition of the term 'employee' was being used by the trustees. *Id.* at 1440.

The Ninth Circuit's decision herein stands virtually on its own and is inconsistent with the decisions of other circuit courts of appeal (as well as the New Hampshire Supreme Court) both with regards to the deference it is willing to afford the legal conclusions of plan administrators and with regards to its willingness to allow plan administrators to supply a definition of the term "employee" that is inconsistent with its well established federal common law definition.

In essence, the Ninth Circuit's decision allows plan administrators to add conditions for benefit eligibility that are not present in the express terms of the plans themselves. Pursuant to the Ninth Circuit's reasoning, the plan administrators herein would be acting within the range of their discretion by denying benefits to an individual who met all of the standards for "employee status" under *Darden* simply because the employer chooses not to treat the individual as a "W-2" employee. A condition is thus being added: one has to be an "employee" who has *also* been asked to fill out a "W-2" form by his employer to be eligible for coverage under the

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[6] In the case at bar, although the Plan Committees paid "lip service" to the common law test, they made no findings concerning NWP's supervisory powers over petitioners and thus ignored the "right to control", the linchpin of the common law test. (App., *infra*, 31a to 32a).

plan. This in essence allows the employer to define eligibility even if it is clear beyond any doubt that the individual is an "employee" under the "right to control" test.[7]

Numerous courts have ruled that plan administrators act in an arbitrary and capricious manner when they deny benefits based on conditions for eligibility that are not set forth in the plan documents themselves. *Epright v. Environmental Resources Management, Inc.*, 81 F.3d 335, 342 (3rd Cir. 1996); *Ganze v. Dart Industries, Inc.*, 741 F.2d 790, 793 (5th Cir. 1984); *Maness v. Williams*, 513 F.2d 1264, 1267 (8th Cir. 1974). The case at bar does not involve a situation in which an administrator properly interprets ambiguous plan language. It is rather a situation where the plan administrator is grafting an additional unwritten requirement onto an unambiguous term that has a well-settled federal common law meaning.

The Ninth Circuit's decision herein also leads to absurd results. To have standing to sue under ERISA, a plaintiff must establish status as a statutory "employee" as defined in *Darden*. Once this burden is satisfied, plaintiff must establish that he is one of the class of employees who is entitled to benefits under the written terms of the plan. *Wolf*, 200 F.3d at 1337. Where the plan simply states that "employees" are entitled to benefits without defining the term, it makes no sense to hold that the test for eligibility under the plan is any different than would be the test for coverage under the statute.[8] If a plan sponsor wants the test for eligibility to be different, it certainly may draft plan language that contains a more restrictive definition than that of the statute itself. Since

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[7] Put another way, the Plan Administrators are adding another exclusion to the ones that are expressly set out in the plan documents, an exclusion for employees that are not required to sign W-2 forms by NWP. (App., *infra*, 56a, 58a to 59a).

[8] This was, in essence, the conclusion of Justices Thomas and Ginsburg in *Mayeske*, 905 F.2d at 1557, n.11.

the plans at issue herein do not contain such restrictive language and since the Plan Administrators are required to interpret the plans in light of ERISA, it is not up to them to supply additional restrictive language by interpretive fiat. The Plan Administrators' attempts to do so herein were, as the district court recognized, arbitrary and capricious.

CONCLUSION

For the above reasons, the petition for Writ of Certiorari should be granted.

Respectfully submitted,

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